

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARY LOU SHEPARD-RAY

Claimant

VS.

DILLONS, INC.

Self-Insured Respondent

Docket No. 1,000,170

ORDER

Claimant requested review of the December 1, 2005, Award Upon Review and Modification by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on March 7, 2006.

APPEARANCES

Chris Miller, of Lawrence, Kansas, appeared for the claimant. Scott J. Mann, of Hutchinson, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the pleadings and correspondence contained in the administrative file, the transcripts of hearings and deposition taken in connection with the litigation of claimant's Award, as well as the transcript of the Hearing on Application for Review and Modification held on August 22, 2005; the transcript of the deposition of Dr. Edward Prosic taken on October 7, 2005, with attached exhibits; the transcript of the deposition of Dr. Peter Bieri taken November 3, 2005, with attached exhibits; and the deposition of Michael Dreiling taken on October 17, 2005, with attached exhibits. The Board adopts the stipulations listed in the ALJ's Award dated August 6, 2003.

ISSUES

The ALJ found that following claimant's original Award of August 6, 2003¹, claimant had undergone surgery on her back and had a total left hip replacement. However, the ALJ found no evidence that claimant's surgeries were related to her original injury of April 20, 2001, and, accordingly, claimant failed to prove any change in her condition which would permit modification of her previous Award.

Claimant argues that the ALJ erred in finding that she failed to prove any change in her condition which would permit modification of her previous Award. Claimant contends she is entitled to additional compensation for her injuries, based either upon increased functional impairment or upon work disability.

Respondent argues that claimant is precluded from re-litigating the Board's decision that claimant's injury is limited to her right hip. Respondent asserts that claimant has not presented any evidence on review and modification that her award was inadequate or that her functional impairment or work disability has changed with respect to her right hip injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds that the ALJ's denial of claimant's request for modification of the Board's prior Order should be affirmed.

On April 20, 2001, claimant fell while working as a floral department manager for respondent. She initially claimed injuries to her left knee and right hip. She had a total right hip replacement on November 19, 2001, which was performed by Dr. William Bohn, a board certified orthopedic surgeon. After this hip surgery, claimant began to complain of low back pain. Claimant had a previous work-related injury while working for respondent in 1991, wherein she injured her low back. She had also been treating with a chiropractor, Dr. James Allen Dray, for various conditions, including low back pain, since 1997.

The issue of whether claimant's low back complaints were caused or contributed to by her accident of April 20, 2001, was litigated by the parties in the original case. Dr. Dray testified that when he saw claimant five days after the accident, claimant reported that her back felt fine. Dr. Bohn did not rate her low back condition, testifying that he "didn't feel

¹The ALJ's Award of August 6, 2003, found claimant suffered a 19 percent permanent impairment to her low back and right hip. It was appealed to the Board and modified by Order dated February 9, 2004, to a 15 percent permanent partial disability based upon impairment to the hip only. The Board concluded claimant failed to prove additional permanent impairment to her back over and above her preexisting back condition.

it was pertinent to the April, 2001 injury at [respondent].”² Dr. Bohn gave claimant a 15 percent whole person permanent partial impairment for the right hip. Dr. Peter Bieri, who is board certified by the American Academy of Disability Evaluating Physicians, examined claimant at the request of the ALJ. He initially attributed claimant’s low back impairment to the April 2001 injury and gave claimant a 15 percent whole person permanent partial impairment for the right hip and a 5 percent whole person permanent partial impairment for the low back, which combined for a 19 percent functional impairment rating to the body as a whole. However, when given a hypothetical of the history and symptoms contained in Dr. Dray’s records for claimant, Dr. Bieri was unable to state with reasonable medical probability that the low back injury was a result of the April 2001 fall. Dr. Edward Prostic, who is board certified in orthopedic surgery, examined claimant at the request of claimant’s attorney on April 1, 2002. He opined that claimant’s low back condition was aggravated by the fall at work and rated claimant as having 15 percent permanent partial disability to the body for the right hip and 15 percent for the low back, which combined for a 28 percent permanent partial impairment to the body as a whole on a functional basis.

Claimant did not make a claim for injuries to her left hip in the original case. Likewise, after her left knee was initially treated by Dr. Dray and claimant’s family doctor, no further complaints were made concerning the knee, and it was not rated by either Dr. Bieri or Dr. Prostic.

In his Award entered August 6, 2003, the ALJ stated: “The court finds that claimant’s back injury was a natural consequence of and directly related to the original work related injury and occurred as the result of the treatment provided the claimant. The court adopts the findings of Dr. Bieri regarding functional impairment.”³

The matter was appealed to the Board, who modified the ALJ’s Award, stating: “The ALJ’s finding of five percent impairment for the back injury, which the ALJ awarded based upon the opinion of Dr. Bieri, should be reversed because neither Dr. Bohn nor Dr. Bieri could relate that impairment to claimant’s April 20, 2001 accident at work.”⁴ The Board retained the 15 percent permanent partial disability given to claimant for the injuries to her right hip.

Claimant filed an Application for Review and Modification on March 11, 2005, claiming that the “worker’s condition has deteriorated and disability has increased.”⁵ Claimant asserts that after entry of the Board’s Order of February 9, 2004, she received

²Bohn Depo. at 28.

³ALJ Award (Aug. 6, 2003) at 2-3.

⁴Order (Feb. 9, 2004) at 11.

⁵Form K-WC E-5 (filed Mar. 11, 2005).

extensive medical treatment, including a total left hip replacement in August 2004 performed by Dr. William Neal and a two-level fusion, L4 through S1, performed by Dr. Mary Neal. Recently, she had arthroscopic surgery to her left knee, which was performed by Dr. William Neal. Respondent had denied medical care to claimant after June 29, 2004. Claimant did not request authorization through workers compensation for her surgeries, and the bills were submitted to her husband's health insurance carrier.

Claimant was seen by Dr. Prostic at the request of her attorney on March 15, 2005, to re-evaluate her April 2001 injury. Dr. Prostic reviewed her medical records and conducted a physical examination. He noted that since his last examination of claimant, she had a total left hip replacement and had undergone two-level arthrodesis to her low back. In his report of April 1, 2002, Dr. Prostic had stated he believed that claimant had preexisting degenerative disc disease in her low back which was aggravated by the accident. He had said claimant also suffered from pseudo-spondylolisthesis, but he could not tell without reviewing an x-ray taken before the accident whether this was caused by the accident or aggravated by it. After his examination of claimant on March 15, 2005, it was still his opinion that her low back condition was caused or contributed to by her work at respondent.

Dr. Prostic rated claimant as having permanent partial impairment to the body as a whole in the amount of 15 percent for her right hip, which was unchanged from his rating in 2002, and a 25 percent impairment for the low back, which combined for a 36 percent permanent partial disability to the body as a whole on a functional basis based on the AMA *Guides*.⁶ He did not rate claimant's impairment from the left hip condition, as he did not believe the left hip replacement surgery was related to claimant's accident at respondent. Dr. Prostic did not mention claimant's complaints concerning her left knee in either his report dated March 15, 2005, or his deposition taken October 7, 2005.

It was Dr. Prostic's opinion that claimant would need annual medical supervision of her total hip replacements and may require low back surgery in the future as she did not appear to have a solid fixation at L4-L5. Dr. Prostic reviewed the task list prepared by Michael Dreiling, and it was his opinion that claimant was unable to perform 6 of the 13 tasks for a task loss of 46 percent.

In the original case, the ALJ sent claimant to Dr. Bieri for an independent medical examination (IME). Dr. Bieri saw claimant on February 5, 2003. He did not find any injury or impairment to the left hip or left knee. Claimant did have complaints about her low back in February 2003, which she attributed to her work-related injury at respondent. At that time, Dr. Bieri diagnosed her with chronic lumbar strain, exacerbating preexisting degenerative joint disease. Dr. Bieri gave her a her 15 percent whole person permanent

⁶American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

partial impairment for residuals of hip replacement on the right and a 5 percent whole person permanent partial impairment for the low back under the DRE Category II.

During this post-award proceeding, the ALJ again sent claimant to Dr. Bieri for an IME, which was done on August 22, 2005. Dr. Bieri took a history from claimant from the time of his last examination of her. Claimant told him she had developed progressive pain in her left hip and had developed problems with her low back and her left knee and that “[h]er symptomatology became worse during her work activity in Wyoming, and primarily involved the left hip and low back.”⁷ She denied any specific injury subsequent to the injury of April 2001. Dr. Bieri noted that claimant had undergone a total left hip replacement and a lumbar fusion at two levels since Dr. Bieri’s earlier examination of her, as well as an arthroscopic procedure involving her left knee.

In February 2003, Dr. Bieri had given claimant a 5 percent permanent partial impairment rating to the body as a whole based on an aggravation caused by the work injury at respondent. He agreed that claimant’s current impairment would be greater now than it was in February 2003. He also agreed that claimant’s condition related to her left hip and low back had deteriorated substantially from when he saw her in February 2003. When he saw her again in August 2005 claimant had an antalgic gait favoring the left, while in February 2003 she had an antalgic gain favoring the right. He also stated that an individual’s degenerative joint disease of the lumbar spine can be aggravated, accelerated or intensified as a result of an antalgic gait.

Nevertheless, based on Dr. Bieri’s examination of claimant on August 22, 2005, he opined: “[T]his evaluation fails to support any causal relationship between the injury of April 30, 2001 and the subsequent surgical interventions to the left hip, low back, and left knee.”⁸ He testified in his deposition that the medical records he received reflected no significant problems with claimant’s left knee until after her surgeries on her left hip and lower back. He also was of the opinion that the medical documentation he reviewed was deficient in justifying surgery to the low back or left hip. Also, at least one consultant attributed these surgeries solely to arthritic conditions unrelated to injury. Dr. Bieri’s report stated:

Calculation of impairment ratings involving the left hip, low back, and left knee are accordingly deferred. If anything, any true impairment would be related more to the work activity described in Wyoming, as opposed to that of the original employer.⁹

⁷Bieri Depo. (Nov. 3, 2005), Ex. 2 at 5.

⁸Bieri Depo. (Nov. 3, 2005), Ex. 2 at 6.

⁹Bieri Depo. (Nov. 3, 2005), Ex. 2 at 7.

Michael Dreiling is a vocational rehabilitation counselor who visited with claimant by telephone at the request of claimant's attorney on September 15, 2005. In visiting with claimant, Mr. Dreiling prepared a task list containing 13 tasks which claimant performed in her 15-year work history before her accident of April 2001. Mr. Dreiling's report indicates that claimant reported she was not working and concluded she demonstrated a 100 percent wage loss. Mr. Dreiling did not give an opinion concerning claimant's current ability to earn wages. He was not asked about whether claimant had made a good faith effort to become employed, and claimant did not testify concerning any job search after she left her employment in Wyoming in April 2004. Claimant has applied for Social Security benefits but has been denied twice, and at the time of the Review and Modification Hearing was in the process of appealing the denial.

K.S.A. 44-528(a) authorizes review and modification of an award if one of several events occurs, including "the functional impairment or work disability of the employee has increased or diminished." The purpose of K.S.A. 44-528 is to provide a means of increasing, decreasing or canceling compensation in accordance with the changed condition of the worker as justice requires.¹⁰ This may include an economic change merely affecting work disability.¹¹ The purpose of review and modification is not, however, to revisit the issues decided in the original award.¹² The burden of establishing the changed condition is on the party asserting the same.¹³

The Board finds that claimant has failed to prove she has suffered an aggravation of her low back or right hip conditions that is directly traceable to her original April 20, 2001, work-related accident.¹⁴ Rather, the worsening of claimant's conditions are a combination of a natural progression of her preexisting low back condition and her subsequent work activities after leaving her employment with respondent.

¹⁰ See *Gile v. Associated Co.*, 223 Kan. 739, 576 P.2d 663 (1978).

¹¹ *Ruddick v. Boeing Co.*, 263 Kan. 494, 949 P.2d 1132 (1997); *Lee v. Boeing Co.*, 21 Kan. App. 2d 365, 899 P.2d 516 (1995).

¹² *Brown v. Goodyear Tire & Rubber Co.*, 211 Kan. 742, 508 P.2d 492 (1973); *Hurst v. Independent Construction Co.*, 136 Kan. 583, 16 P.2d 540 (1932).

¹³ See *Davis v. Haren & Laughlin Construction Co.*, 184 Kan. 820, 339 P.2d 41 (1959); *Morris v. Kansas City Bd. of Public Util.*, 3 Kan. App. 2d 527, 598 P.2d 544 (1979).

¹⁴ See *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 505 P.2d 697 (1973); *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award Upon Review and Modification of Administrative Law Judge Brad E. Avery dated December 1, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris Miller, Attorney for Claimant
Scott J. Mann, Attorney for Self-Insured Respondent
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director